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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT LEE HAYMORE,

Defendant and Appellant.

B293957

(Los Angeles County
Super. Ct. No. BA463812)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Mark S. Arnold, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Amanda V. Lopez and Michael C. Keller,
Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In an information filed January 22, 2018, the Los Angeles County District Attorney's Office charged defendant and appellant Robert Lee Haymore with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); counts 1 & 2),¹ assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4); counts 3 & 4), and robbery (§ 211; count 5). It was further alleged with respect to counts 3, 4, and 5 that defendant used a deadly weapon (a BB gun) within the meaning of section 1192.7, subdivision (c)(23), and with respect to count 1 that he inflicted great bodily injury within the meaning of section 12022.7. Defendant pled no contest to counts 1 and 2 and admitted, with respect to count 1, that he had inflicted great bodily injury within the meaning of section 12022.7. The remaining counts were dismissed.

Defendant was sentenced to seven years in state prison. The trial court imposed a \$300 restitution fine, a \$60 criminal conviction assessment, and an \$80 court operation fine.

Defendant timely appealed. His sole argument on appeal is that, pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1163–1173 (*Dueñas*), the trial court erred in imposing the criminal conviction assessment (Gov. Code, § 70373), the court operations assessment (§ 1465.8), and the restitution fine (§ 1202.4) without first determining that defendant is able to pay those fines, in violation of defendant's right to due process.

We affirm.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

DISCUSSION

As defendant concedes in his opening brief, he did not object to the assessments or fines in the trial court. Thus, he has forfeited his claim on appeal.

Even before *Dueñas*, a trial court could “consider[]” a defendant’s “[i]nability to pay” whenever it “increase[ed] the amount of the restitution fine” in excess of the minimum of \$300 applicable here. (§ 1202.4, subds. (b)(1), (c).) Defendant did not object or otherwise present any evidence regarding his ability to pay to the trial court at sentencing. As a result, the issue has been forfeited on appeal. (See, e.g., *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468–1469; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [by failing to object to fees or fines in the trial court, the defendant forfeited his objection on appeal]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155.)

Moreover, we reject defendant’s contention that his objection would have been futile. “Although [the] statutory provisions mandate the assessments be imposed, nothing in the record of the sentencing hearing indicates that [defendant] was foreclosed from making the same request that the defendant in *Dueñas* made in the face of those same mandatory assessments. [Defendant] plainly could have made a record had his ability to pay actually been an issue. Indeed, [defendant] was obligated to create a record showing his inability to pay the maximum restitution fine, which would have served to also address his ability to pay the assessments.” (*People v. Frandsen, supra*, 33 Cal.App.5th at p. 1154.)

“More fundamentally, we disagree with [defendant’s] description of *Dueñas* as ‘a dramatic and unforeseen change in the law’ [Citation.]” (*People v. Frandsen, supra*, 33 Cal.App.5th at p. 1154.) “*Dueñas* was foreseeable.” (*Id.* at p. 1154.)

Setting aside this procedural obstacle, defendant’s argument fails on the merits. Based on the constitutional guarantees of due process and ban against excessive fines, *Dueñas* held that trial courts may not impose three of the standard criminal assessments and fines—namely, the \$30 court operations assessment (§ 1465.8), the \$40 criminal conviction assessment (Gov. Code, § 70373), and the \$300 restitution fine (§ 1202.4)—without first ascertaining the “defendant’s present ability to pay.” (*Dueñas, supra*, 30 Cal.App.5th at pp. 1164, 1171, fn. 8.) We need not decide whether we agree with *Dueñas* because defendant is not entitled to a remand even if we accept *Dueñas*. That is because the record in this case, unlike the record in *Dueñas*, indicates that defendant has the ability to pay the assessments and fines imposed in this case. A defendant’s ability to pay includes “the defendant’s ability to obtain prison wages and to earn money after his release from custody.” (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376.) Prisoners earn wages ranging from \$12 per month (for the lowest skilled jobs) to \$56 per month (for the highest). (Cal. Dept. of Corrections & Rehabilitation, Operations Manual, §§ 51120.6, 51121.10 (2019).) At these rates, given defendant’s seven-year sentence, he will have enough to pay the assessments and fines.²

² Even if defendant does not voluntarily use his wages to pay the amounts due, the state may garnish between 20 and 50 percent of those wages to pay the restitution fine. (§ 2085.5, subds. (a) & (c); *People v. Ellis* (2019) 31 Cal.App.5th 1090, 1094.)

It follows that we reject defendant’s argument that the restitution fine must be stayed unless and until the People prove he has a present ability to pay.³

DISPOSITION

The judgment is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT

³ In so concluding, we note that defendant “points to no evidence in the record supporting his [present or future] inability to pay.” (*People v. Gamache* (2010) 48 Cal.4th 347, 409.) And, defendant offers no legal authority in support of his suggestion that because he was represented by appointed counsel at trial, he necessarily cannot afford to pay the court-ordered fines. In fact, the law holds otherwise. (See, e.g., *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397 [“a defendant may lack the ‘ability to pay’ the costs of court-appointed counsel yet have the ‘ability to pay’ a restitution fine”].)